# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>DOUGLAS JOHN HEENEY,<br><br>Appellant. | ) | DIVISION ONE<br><br>No. 62429-6-I<br><br><br>UNPUBLISHED OPINION<br><br><br>FILED: July 27, 2009 |

DWYER, A.C.J. – Douglas Heeney appeals the trial court's denial of his motion to suppress evidence. He contends that he was unconstitutionally seized when two police officers approached him and asked what he had been doing in a bookstore. Because no evidence indicated that the officers used force or authority to restrain Heeney or that a reasonable person would not have believed that he was free to leave or decline to answer, we affirm.

FACTS

The State charged Douglas Heeney with possession of heroin. Heeney moved to suppress physical evidence. Following a CrR 3.6 hearing, the trial court entered written findings of the following undisputed facts:

> a. On March 3, 2008, at about 1:50 p.m., Seattle Police Bicycle Officers Christopher Toman and Amber McLeod observed the Defendant and an individual named Ryan Fournier walking quickly to the lower back "book buy" entrance of a business named Half-Price Books, located at 115 Belmont Avenue E. in

the Capital Hill area of Seattle. Officers Toman and McLeod were located across the street at a Starbucks.

b. Officer Toman and McLeod knew Fournier from a prior narcotics arrest, and knew the Defendant from previous narcotics complaints.
c. The Defendant entered the store while Fournier waited outside. The officers observed Fournier pacing back and forth acting very nervously. Fournier was observed peering around the corners of the store. According to the officers, Fournier appeared to be acting as a "lookout."
d. After approximately ten minutes, the Defendant came out of the store and joined Fournier. They started to quickly walk away. The Defendant had no package reflecting a purchase from the store.
e. The officers rode up to the men and Officer Toman asked them what they were doing in the bookstore. The Defendant replied that he had been reading a book. He was very nervous and stammered when he spoke.
f. Officer Toman observed a piece of white plastic with brown residue stuck to the outside of the Defendant's pants in the seat area. Officer Toman grabbed the piece of plastic and was able to see the brown residue more closely and smell a strong odor of ammonia coming from it. Based upon his training and experience, Officer Toman knew from his observations and the odor of ammonia that the brown residue on the piece of plastic was black-tar heroin.
g. When the Defendant observed the piece of plastic in Officer Toman's hands, he said, "That's not heroin. That must have stuck to my pants when I was in the store [going to the bathroom.]"
h. Officer Toman asked the Defendant if he had any narcotics, and the Defendant stated, "I have a syringe loaded with blood." At that point, the Defendant was placed under arrest and advised of his Miranda[1] warnings.
i. The Defendant was searched incident to arrest, and the officers recovered approximately twenty-four syringes in different pockets on his person. Two of the syringes were filled with a black liquid which Officer Toman recognized as liquefied heroin.
j. Officer Toman asked the Defendant if he had liquefied the heroin in the bathroom of Half-Price Books. The Defendant replied, "Absolutely not. I already had that."
k. The officers also recovered from the Defendant a miniature digital pocket scale with brown residue, and a burnt spoon with

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

brown residue. The black liquid in the syringes, the digital scale and the burnt spoon were all field-tested by Officer Toman utilizing protocols from the Washington State Patrol Crime Laboratory, and each reacted positively for the presence of heroin.

l. The black liquid from one of the syringes, the digital scale and the burnt spoon were further tested at the Washington State Patrol Crime Laboratory by forensic scientist Mark Strongman, who found each item containing heroin.

Clerk's Papers (CP) at 20-21.

The trial court also entered conclusions of law, including the following statements:

> A police officer may question an individual when the officer subjectively suspects the possibility of criminal activity, but does not have a suspicion rising to the level to justify a Terry [v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)] stop. State v. O'Neill, 148 Wn.2d 564, 577, 62 P.3d 489 (2003).
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> Here, the officers acted reasonably. They had specific and articulable facts which justified a further inquiry of the Defendant and Fournier. The officers' contact with the Defendant was brief and low-key, and lasted in duration for only a few seconds before Officer Toman observed the piece of plastic with black residue. The Court finds that the officers had a reasonable and sufficient basis that justified their initial stop of the Defendant and Fournier.

CP at 22.

After a stipulated facts bench trial, the court found Heeney guilty as charged and imposed a standard range sentence. Heeney appeals.

## DISCUSSION

Because Heeney does not challenge the trial court's findings of fact, they are verities on appeal. State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489

(2003). We review the trial court's conclusions of law de novo. State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002).

To justify a Terry stop under the Fourth Amendment and article I, section 7 of the Washington Constitution, a police officer must be able to "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); State v. Day, 161 Wn.2d 889, 896, 168 P.3d 1265 (2007). Without a warrant, an officer may briefly stop and detain a person he or she reasonably suspects has committed or is about to commit a crime. Terry, 392 U.S. at 21; Day, 161 Wn.2d at 896.

The legal sufficiency of the officer's reasonable suspicions, however, only become "relevant *once a seizure occurs,* and relate to the question whether the seizure is *valid* under article I, section 7." O'Neill, 148 Wn.2d at 576. A person is seized under article I, section 7, "only when, by means of physical force or a show of authority, his or her freedom of movement is restrained and a reasonable person would not have believed he or she is (1) free to leave, given all the circumstances, or (2) free to otherwise decline an officer's request and terminate the encounter." O'Neill, 148 Wn.2d at 574 (citations and internal quotation marks omitted). A police officer may approach and engage in conversation with an individual based on a subjective suspicion of the possibility of criminal activity that does not rise to the level justifying a Terry stop, so long as the person may walk away without answering. O'Neill, 148 Wn.2d at 577-78

(quoting State v. Cormier, 100 Wn. App. 457, 460-61, 997 P.2d 950 (2000)). The question of whether a seizure occurred is purely objective, based on the officer's actions. O'Neill, 148 Wn.2d at 574. Heeney has the burden of proving that a seizure occurred. O'Neill, 148 Wn.2d at 574.

Heeney contends that the trial court concluded that he was seized when the officers approached him and asked him what he was doing in the book store. Heeney relies on the reference to the "initial stop" in the written conclusions of law. But at the hearing, the trial court specifically stated that when the officers "came up to them and said, what were you doing in there?," the officers had not yet restricted the men's freedom and therefore had "not completed a Terry stop."[2]

As the State argues, the trial court properly concluded that the officers' initial contact with Heeney was not a seizure. The officers rode up to Heeney and Fournier as they walked on a public street and asked what Heeney was doing in the store. Contrary to Heeney's claim, there is no evidence that the officers used coercive language or that something in Officer Toman's initial question compelled Heeney to remain where he was. Cf. State v. Ellwood, 52 Wn. App. 70, 73, 757 P.2d 547 (1988) (seizure occurred when officer directed defendant to "wait right here"). Nothing in the record indicates that the officers used any show of force or authority, commanded or directed Heeney to do anything, or obstructed Heeney's movements in any way. Under these

[2] In its written findings and conclusions, the trial court incorporated by reference its oral findings and conclusions.

circumstances, Heeney fails to demonstrate that a seizure occurred when the officers initially contacted him. See, e.g., O'Neill, 148 Wn.2d at 578-80 (no seizure occurred when officer shined spotlight on defendant's car, approached car and shined flashlight into it, asked defendant to roll down window, asked defendant to try to start car, and asked for defendant's identification); State v. Nettles, 70 Wn. App. 706, 708, 711, 855 P.2d 699 (1993) (no seizure occurred when officer approached in car without siren or lights, got out of car without drawing gun, called out in normal voice, "Gentlemen, I'd like to speak with you, could you come to my car?," made no attempt to stop other person who walked away, and told the defendant to remove his hands from his pockets and come towards her car). Because Heeney fails to demonstrate any constitutional violation, the trial court properly denied his motion to suppress evidence.

Heeney also contends that the late filing of the written findings of fact and conclusions of law as to his guilt requires reversal if such findings and conclusions have been tailored to address the issues on appeal.[3] Because Heeney fails to argue or establish that he was prejudiced by the late filing or identify any indication of tailoring, reversal is not required. State v. Nelson, 74 Wn. App. 380, 393, 874 P.2d 170 (1994).

Affirmed.

[3] CrR 6.1(d) provides: "Trial Without Jury. In a case tried without a jury, the court shall enter findings of fact and conclusions of law. In giving the decision, the facts found and the conclusions of law shall be separately stated. The court shall enter such findings of fact and conclusions of law only upon 5 days' notice of presentation to the parties."

Dwyer, A.C.J.

WE CONCUR:

Appelwick, J.

Leach, J.